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October 8, 2003

Mr. W. Kenneth Ferree
Chief Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Ferree:

RE: In the Matter of MB Docket No. 02-230 Digital Broadcast Copy Protection

The IT Coalition, Public Knowledge and Consumers Union have evidently concluded that they cannot prevent adoption of a Broadcast Flag by opposing the Flag on its merits, and have resorted to obfuscation and dissembling to achieve their goal.

These groups have all recently endorsed the idea of "bifurcating" this proceeding. In the words of the IT Coalition, the Commission "should divide the process into two parts: first, adoption of general rules permitting 'tagging' HDTV broadcasts with a 'flag,' and, second, issuance of a further rule making notice seeking comment on robustness and on complex and critically important certification and de-certification rules for technologies ..." that implement the Flag.

Translated into plain English, this means that the Commission should do nothing except to put out another further notice, because the "tagging" of broadcast content with a Broadcast Flag would have no effect without a requirement to recognize and respond to the Flag. There is nothing to prevent use of the Flag today, but it would be a useless exercise because it would not prevent the redistribution of the Flagged content.

The IT Coalition not only asks the Commission to delay, it attempts to narrow the scope of this proceeding by referring to "HDTV broadcasts." The Commission's Notice addresses all digital television broadcast programming and is not, nor should it be, limited to high definition.

The IT Coalition goes on to say that there is no urgency to require devices to respond to the Flag because, unlike in the "plug and play" context, "Here, DTV devices are already on the market, so the need to provide certainty to the consumer electronics market does not apply."

This, of course, is an utterly meaningless statement -- the need to provide certainty for consumer electronics manufacturers is not the only possible basis for urgency. There is urgency, great urgency, precisely because DTV devices are on the market, and a Flag regulation adopted now will take time to implement. Until rules requiring devices to respond to the Flag are in effect, every DTV device sold becomes a legacy device that will delay full realization of the objective the Flag is intended to achieve -- curtailing the redistribution of DTV content on digital networks. And, if the Flag requirements are not implemented concurrently with the plug & play rules, a new and more injurious generation of legacy devices will enter the marketplace.

Fortunately, the vast majority of existing DTV devices have only analog outputs, which are not at risk for redistribution and will be completely unaffected by the Broadcast Flag regime. However, there are recently introduced DTV receiver products with digital 1394 outputs which do not implement the Flag and, therefore, pose a risk of redistribution. At the moment, their numbers are small. But the much larger numbers of plug & play products to which the Commission gave the green light in last month's ruling will have digital outputs that place DTV content at risk for redistribution even as the same outputs protect cable content. As a result of this FCC decision, the product cycle for an unprecedented number of new devices has already begun...without the guaranteed inclusion of the Flag requirements. It is imperative that the Flag be enacted in time to require implementation in these products, if a massive legacy problem is to be avoided.

And, contrary to the claims of the IT Coalition, the burden of compliance with the Broadcast Flag on device manufacturers is small. The vast majority of devices will have to comply with robustness requirements for handling encrypted cable and satellite programming. Compliance with the Broadcast Flag robustness requirements will be a far lesser burden than compliance with the complex regulatory scheme devised by the cable and consumer electronics industries, and adopted by the Commission in its plug & play decision.

Finally, the IT Coalition quotes MPAA President Jack Valenti as supporting its position. Nothing could be further from the truth. Mr. Valenti's statement that the full impact of video downloading is "three or four years away" only points out the urgency of adopting Broadcast Flag rules NOW. The three or four years Mr. Valenti refers to is the time frame to roll out a significant broadband infrastructure that can nurture the same levels of piracy of audiovisual content as currently being experienced by and decimating the music industry. DTV devices with unprotected digital outputs will start appearing in consumers' hands in large numbers in the very near future, if the CE industry's representation to the FCC to heavily promote DTV (made during the plug & play proceeding) becomes reality. The FCC must implement the Broadcast Flag to limit the number of legacy devices that can be used to pirate audiovisual content. Delay now places more legacy devices in the market three or four years from now, when redistribution of video files could force content owners to migrate from free broadcast television to more secure delivery systems. The time to close the barn door is before, not after the horse has escaped.

This proceeding was initiated more than one year ago, after many more months of debate by interested parties, including the members of the IT Coalition, in the Broadcast Protection Discussion Group (BPDG). All parties have had an ample opportunity to make their respective cases, and in fact have done so. (It is also worth noting that the Commission adopted a much more complex regulatory scheme in its plug & play decision after a shorter period of public comment than has been given in the Broadcast Flag proceeding.)

The IT Coalition has asked the Commission to follow the lead of Nero -- to fiddle while Rome burns. The public interest requires more responsible action.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul Gallant", with a long horizontal flourish extending to the right.

cc: Secretary Marlene H. Dortch
Paul Gallant
Stacy Robinson Fuller
Johanna Mikes
Anthony Dale
Jordan Goldstein
Rick Chessen
Steven Broeckaert
Allison Greenwald
Bill Johnson
Deborah Kline
Jonathan Levy
Susan Mort
Mary Beth Murphy
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